BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TOMMY G. TACKETT	)	
Claimant	)	
VS.	)	
	)	Docket No. 163,962
KOCH CHEMICAL COMPANY	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Court of Appeals, in an unpublished opinion filed December 19, 1997, reversed and remanded this matter to the Workers Compensation Appeals Board for a determination of the appropriate award due claimant, having found that claimant's second surgery was necessitated by his work-related injury.

APPEARANCES

Claimant appeared through his attorney, David L. McLane of Pittsburg, Kansas. Respondent and its insurance carrier appeared through their attorneys, Douglas C. Hobbs and Christopher J. McCurdy of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Steven L. Foulston of Wichita, Kansas. There were no other appearances.

ISSUES

What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In its unpublished decision of December 19, 1997, the Kansas Court of Appeals found that the May 1992 second surgery performed on claimant's foot was necessitated by the work-related injury, and claimant was entitled compensation resulting from that surgery.

The matter was remanded to the Workers Compensation Appeals Board for a determination of the appropriate award in light of claimant's corrective surgery and subsequent limitations.

The issue regarding Fund liability was not appealed to the Kansas Court of Appeals. The Board's earlier finding affirming the Special Administrative Law Judge's Award of 100 percent of the liability to the Kansas Workers Compensation Fund remains in effect.

Findings of Fact

Claimant began working for respondent Koch Chemicals in 1990 as an operator, mixing chemicals. He was required to be on his feet 12 hours a day walking to and from tanks. Claimant suffered polio as a child, resulting in a deformed left foot. The amount of time claimant spent on his feet is significant considering this preexisting deformity.

In its August 29, 1996, decision, the Appeals Board found that the claimant underwent a job injury-related, first surgery on April 2, 1992, to remove a portion of the claimant's fifth metatarsal. This treatment was necessary to clear up an infection and osteomyelitis which had developed in claimant's foot. In May 1992, claimant underwent a second surgery by Dr. Jerry Maxwell which the Appeals Board found to be a nonwork-related elective surgery to correct a preexisting condition. The Kansas Court of Appeals found that this second surgery was necessitated by claimant's injury suffered while employed with respondent.

Claimant was examined and/or treated by three different physicians whose testimony is in the record. Dr. David A. McQueen, a board-certified orthopedic surgeon, examined claimant on May 26, 1993. Dr. McQueen's examination was limited to claimant's left lower extremity. He did not examine claimant's back, as, at the time of the examination, claimant had no back complaints. Dr. McQueen assessed claimant a 6 percent whole body impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), for the lower extremity problems. Dr. McQueen recommended claimant sit and stand, alternating, with no repetitive stair climbing. He acknowledged claimant could walk on uneven surfaces intermittently, but he should not do so continuously. He was asked about the restrictions placed upon claimant by Dr. Edward Prostic. He specifically disagreed with the pushing and pulling restrictions as he didn't believe pushing and pulling had anything to do with claimant's injury or symptoms. He also felt lifting and carrying wouldn't be affected unless the lifting and carrying involved a significant amount of walking.

Claimant was examined and treated by Dr. James T. Hamilton, an osteopath and a podiatrist. Dr. Hamilton is board qualified but not yet board certified. He explained that he had to be in practice for seven years before he could become board certified. He performed the surgery on claimant's foot on April 2, 1992, removing the infected bone from the base of the fifth metatarsal and removing a portion of the fifth metatarsal itself. Dr. Hamilton limited claimant to prolonged standing or walking for no longer than 30 minutes and felt claimant would have difficulty climbing or carrying heavy objects. He also felt pushing and pulling would put a strain on the left foot and leg, and walking on uneven surfaces would cause some difficulty. He was asked about claimant's functional impairment

but testified that he did not compute a functional impairment on claimant. Dr. Hamilton then referred claimant to Dr. Jerry Maxwell for the reconstructive surgery.

Claimant was examined by Dr. Edward Prostic, a board-certified orthopedic surgeon, at claimant's attorney's request. Dr. Prostic felt claimant had a 30 to 35 percent whole body functional impairment including not only the left lower extremity but also the low back. Dr. Prostic advised claimant should avoid work that required prolonged standing or walking, constant climbing or walking on uneven surfaces, and substantial pushing, pulling, lifting or carrying. Dr. Prostic opined claimant would have difficulties standing in one place more than 30 minutes or sitting for more than one hour. Dr. Prostic limited claimant to no more than 40 pounds lifting at any one time with no repetitive lifting of more than 15 pounds, more than 20 times per hour. When asked to separate the leg impairment from the low back impairment, Dr. Prostic assessed claimant a 20 percent impairment to the body as a whole as a result of the leg injuries and a 10 to 15 percent impairment to the body as a whole as a result of the low-back problems. Dr. Prostic testified that claimant's low-back problems were due to claimant's limping as a result of the second surgery.

The Appeals Board finds that claimant's low-back problems did develop as a result of limping, post-surgery. In considering the various opinions of the medical physicians, the Appeals Board finds claimant has suffered a 13 percent permanent partial impairment to the body as a whole as a result of the leg difficulties and a 12.5 percent impairment to the body as a whole as a result of his back problems. Claimant's total functional impairment computes to 23.5 percent to the body as a whole.

K.S.A. 1987 Supp. 44-510e defines work disability as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment.

Only one vocational expert opinion was offered into evidence. Michael K. Lala is a self-employed, certified rehabilitation counselor qualified as a rehabilitation counselor in Kansas. In considering claimant's injuries and based upon the restrictions of Dr. Hamilton, Mr. Lala estimated claimant had lost 97 to 98 percent of his ability to perform work in the open labor market. However, on cross-examination, Mr. Lala's opinion was challenged. He used Dr. Hamilton's restrictions coupled with claimant's statements of what he could and could not do in reaching his opinions regarding claimant's loss of ability to perform in the open labor market. However, there were several limitations considered by Mr. Lala that do not coordinate with Dr. Hamilton's restrictions. Mr. Lala assumed that claimant's inability to stand for lengthy periods of time would prohibit him from operating foot controls, therefore, placing him in the sedentary category. While Dr. Hamilton restricted claimant's ability to push and pull with his foot, Mr. Lala merely assumed that foot controls were

beyond claimant's ability even though no medical restrictions support this assumption. Mr. Lala acknowledged claimant spends all or part of his day driving around town in a standard transmission vehicle which requires intermittent clutching.

Mr. Lala also assumed that Dr. Hamilton had restricted claimant to 30 pounds lifting. He acknowledged he had no evidence of the 30 pound limit. The record shows the limitation placed on claimant by way of single lift was 40 pounds. Mr. Lala eliminated all climbing and balancing jobs based upon claimant's limitation of intermittent standing and sitting. However, he acknowledged Dr. Hamilton did not specifically restrict claimant regarding balancing. Mr. Lala limited claimant's ability based upon a preclusion from stooping. However, Dr. Hamilton's specific limitations do not preclude stooping.

In addition, Mr. Lala eliminated any wet or humid environments based upon claimant's statement that moisture makes his foot hurt. However, there are no medical restrictions which preclude wet and humid environments. All vibration jobs were eliminated including jobs involving vibration to the upper extremities. However, there were no restrictions from Dr. Hamilton precluding the use of vibratory tools or from working in a vibratory environment. While one doctor did caution that claimant should not use a jack hammer, rivet guns and the like were not mentioned.

Mr. Lala did find claimant capable of performing minimum wage work. Claimant had also testified he felt he could return to his original job at Celltron and that he could return to one of the original jobs he performed for respondent. The job at Celltron paid $5.40 per hour.

Conclusions of Law

In workers compensation litigation, it is the claimant's burden to prove his entitlement to the benefits requested by a preponderance of the credible evidence. *See* K.S.A. 1990 Supp. 44-501 and K.S.A. 1990 Supp. 44-508(g). It is the function of the trier of facts to decide which testimony is more accurate and credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has a responsibility to make its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Claimant's ability to earn a comparable wage can be decided either based upon the testimony of Mr. Lala, who opined claimant was capable of earning minimum wage or through claimant's own admission that he was capable of returning to work for Celltron earning $5.40 per hour. The Special Administrative Law Judge, in considering the evidence and the testimony of the claimant, found claimant capable of earning $5.40 per hour. He then compared this hourly rate with the $9.50 per hour rate claimant was earning on the date of accident. While the Special Administrative Law Judge does not explain the reason for the comparison of hourly rate to hourly rate, the Appeals Board assumes this is due to claimant's testimony that he could return and perform his original job for respondent which would entitle claimant to fringe benefits similar or identical to those claimant was receiving

at the time of the accident. However, the record does not indicate what benefits claimant was earning at Celltron. There is no indication whether Celltron's benefits would be similar to or identical to the benefits claimant was earning with respondent. Therefore, the decision by the Special Administrative Law Judge to compare hourly rate to hourly rate is inappropriate here. In considering claimant's ability to earn $5.40 per hour as compared to claimant's average weekly wage of $561.74, the Appeals Board finds claimant has suffered a loss of ability to earn comparable wages of 61 percent.

The Appeals Board must next look to claimant's loss of ability to obtain work in the open labor market. The only opinion provided is that of Mr. Lala. While Mr. Lala opines that claimant has a 97 to 98 percent loss of access to the open labor market, Mr. Lala's opinion lacks credibility. As noted above, several restrictions and assumptions utilized by Mr. Lala to reach his opinion were inaccurate, including not only inappropriate weight lifting restrictions but also restrictions regarding balancing, climbing, stooping, the use of vibratory tools, and working in a wet and humid environment.

In workers compensation litigation, uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). In this instance, however, while there is no expert opinion contradicting that of Mr. Lala, the Appeals Board finds that Mr. Lala's opinion regarding claimant's ability to obtain work in the open labor market is untrustworthy and cannot be relied upon. As there is no other evidence upon which to compute claimant's loss of access to the open labor market, the Appeals Board finds claimant has failed in his burden of proving what loss of access to the open labor market he has suffered. Therefore, claimant is entitled to no loss of access to the open labor market as a result of this injury.

In determining the extent of permanent partial disability, both the reduction in claimant's ability to perform work in the open labor market and claimant's ability to earn comparable wages must be considered. The statute is silent as to how any type of percentage is to be arrived at. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). However, a mathematical equation or formula must necessarily be utilized in order to arrive at a percentage. Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, *rev. denied* 250 Kan. 806 (1991).

Hughes, while indicating a balancing of the two factors is required, does not state specifically how this balance occurs or what emphasis is to be placed on each of the tests. The Special Administrative Law Judge, in considering the evidence in this matter, placed greater emphasis upon claimant's loss of ability to earn comparable wages than upon his loss of ability to obtain work in the open labor market. In doing so, he also raised questions regarding the opinion of Mr. Lala and the inaccuracy of his testimony. The Appeals Board, in considering both claimant's failure to prove a loss of access to the open labor market and a wage loss of 61 percent, finds claimant entitled to a 30.5 percent permanent partial work disability as a result of the injuries suffered with respondent to both his foot and his low back.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an Award is granted in favor of the claimant, Tommy G. Tackett, and against the respondent, Koch Chemical Company, its insurance carrier, Insurance Company of North America, and the Kansas Workers Compensation Fund for an accidental injury occurring on January 31, 1992, and based upon an average weekly wage of $561.74 for 61.57 weeks temporary total disability compensation at the rate of $289 per week in the sum of $17,793.73, followed thereafter by 353.43 weeks of permanent partial general disability at the rate of $114.23 per week in the sum of $40,372.31 for a 30.5% permanent partial general disability, making a total award of $58,166.04.

As of June 25, 1998, there is due and owing to claimant temporary total disability compensation at the rate of $289 per week for 61.57 weeks totalling $17,793.73, followed thereafter by 272.14 weeks of permanent partial disability compensation at the rate of $114.23 per week in the sum of $31,086.55, making a total due and owing of $48,880.28, which is ordered paid in one lump sum, minus any amounts previously paid.

Thereafter, claimant is entitled to 81.29 weeks permanent partial disability compensation at the rate of $114.23 per week until fully paid or until further order of the Director.

In all other regards, the Award of the Special Administrative Law Judge dated February 14, 1995, is affirmed insofar as it does not contradict the opinions and orders expressed herein.

IT IS SO ORDERED.

Dated this _____ day of September 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David L. McLane, Pittsburg, KS
Douglas C. Hobbs, Wichita, KS
Steven L. Foulston, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director